

The Honorable Richard A. Jones  
The Honorable J. Richard Creatura

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IAN SIMMERS,

Plaintiff,

vs.

KING COUNTY, et al.,

Defendants.

No. 2:21-CV-00100-RAJ-JRC

DEFENDANT KING COUNTY'S  
OBJECTIONS TO MAGISTRATE  
JUDGE'S REPORT AND  
RECOMMENDATION

NOTED ON MOTION CALENDAR  
FOR: July 30, 2021

**I. SUMMARY OF OBJECTIONS**

Plaintiff Simmers has filed §1983 claims and state law claims against King County, the City of Bothell, and individual law enforcement officers from both municipalities arising from a murder investigation and conviction from 1995-1996. All defendants brought motions to dismiss pursuant to Fed. R. Civ. P 12(c) and Magistrate Judge Creatura has issued a report and recommendation recommending dismissal of some of Simmers' claims against defendants and denying dismissal of other claims. King County respectfully objects to the magistrate judge's denial of dismissal of all remaining claims as to King County.

DEFENDANT KING COUNTY'S OBJECTIONS TO  
MAGISTRATE JUDGE'S REPORT AND  
RECOMMENDATIONS (2:21-CV-00100-RAJ-JRC) - 1

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## II. RELEVANT FACTS

Simmers brought this 42 U.S.C. §1983 lawsuit against King County, Bothell, and individual law enforcement officers previously employed by these municipalities. In addition to federal claims of violations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights, Failure to Intervene, and Conspiracy to Violate his Constitutional Rights, Simmers' lawsuit alleges state law claims of malicious prosecution, outrage, conspiracy, and negligence. Dkt. 1. Simmers claims he was wrongfully prosecuted, convicted and incarcerated for the March 11, 1995, stabbing murder of Rodney Gochanaur near the Burke Gilman trail in Bothell, Washington. His factual allegations break down into three categories: (1) that Simmers was interrogated by King County and Bothell police officers in violation of *Miranda* and that his confession was coerced; (2) that John Wyatt was interrogated by police officers in violation of *Miranda* and that his confession was coerced; and (3) that Bothell police officers convinced Kevin Olsen (a jailhouse informant) to give false testimony claiming that Simmers had confessed to the murder while in jail. *See* Dkt. 1. In addition, Simmers alleges that the officers conspired to carry out these unlawful acts. *Id.*

Simmers was charged in King County Superior Court in two separate cases: one case for arson, vehicle prowl, and malicious mischief, and another case for murder. On December 20, 1995, Simmers pled guilty to two counts of Arson in the Second Degree and ten counts of Vehicle Prowl in the First Degree. Dkt. 30 at pp. 838-860.

In litigating the murder charge, Simmers claimed in pre-trial proceedings that his confession was coerced and therefore inadmissible. *Id.* at pp. 5-362. The Superior Court held a thorough hearing and heard testimony from all of the officers present during the course of the custodial interrogation of Simmers. *Id.* They were cross examined by his well-respected

1 criminal defense attorney, John Hicks, regarding allegedly coercive and/or deceptive tactics. *Id.*  
2 Mr. Hicks cross examined the officers about portions of the interrogation that were not tape  
3 recorded and whether the officers purposely or inadvertently fed Simmers information that led  
4 his taped confession to include facts that would only have been known to the killer. *Id.* Both the  
5 tape-recorded confession and the forms advising Simmers of his rights (including specific  
6 juvenile warnings) were admitted into evidence at the hearing.<sup>1</sup> *Id.* Additionally, as is required  
7 under CrR 3.5, Simmers was advised of his right to testify at the hearing and ultimately declined  
8 to do so. *Id.*

9 Simmers submitted briefing and oral argument to the state court asserting that the police  
10 officers' tactics, the setting, and Simmers' age and maturity were such that his confession should  
11 be suppressed as violative of his constitutional rights. *Id.* After considering the facts and  
12 argument, the Superior Court issued oral rulings from the bench and later issued a written ruling.  
13 *Id.* at pp. 352-362. It found that the confession was properly obtained by police and that  
14 Simmers was properly Mirandized. *Id.* It further determined that the confession was knowingly,  
15 intelligently, and voluntarily given and that Simmers' will had not been overborne by deceptive  
16 tactics, suggestions and ruses. *Id.*

17 The confession was admitted at Simmers' trial for Murder in the First. He presented an  
18 alibi defense. *Id.* at 742. Simmers was convicted by a jury at trial. *Id.* at pp. 363-401. Simmers  
19 was sentenced for his Arson, Vehicle Prowl and Murder convictions on May 10, 1996; he  
20 received concurrent sentences. *Id.* at pp. 402-408. He did not appeal his convictions for Arson  
21 and Vehicle Prowl, nor has he ever challenged those convictions.

22  
23 <sup>1</sup> The transcript of the taped portion of the confession is a part of *Ex. K* as the transcript was a part of Simmers' 2019 motion to vacate. *Id.* at 780-796.

1 In the Murder case, pending appeal to the Washington State Court of Appeals, Simmers  
2 filed a post-trial motion for a new trial alleging *Brady* violations related to jailhouse informant  
3 Kevin Olsen. *Id.* at pp. 409-729. The trial court held an evidentiary hearing on the motion and  
4 entered extensive oral and written findings on the motion. *Id.*

5 Following the post-trial motion, in his appeal Simmers claimed the trial court erred by  
6 failing to instruct the jury on a lesser included offense and argued that a new trial was warranted  
7 by the withholding of *Brady* information related to Kevin Olsen. *Id.* at pp. 741-750. Although  
8 he had the opportunity, he did not appeal the pre-trial rulings related to his confession. *Id.* The  
9 Court of Appeals affirmed the murder conviction in 1999. *Id.* In affirming Simmers' conviction  
10 and the trial court's denial of instructing on a lesser included offense the Court of Appeals  
11 expressly relied on the substance of Simmers' unchallenged confession as the basis for  
12 upholding the trial court's ruling. *Id.*

13 In 2019, Simmers again moved to vacate his murder conviction and order a new trial  
14 under CrR 7.8. *Id.* at pp. 751-825. He alleged "newly discovered evidence," namely recent  
15 research regarding the teenage brain and the reliability of juvenile confessions. *Id.* While the  
16 State of Washington did not agree that Simmers was innocent of the crime, it agreed to vacate  
17 Simmers' murder conviction due to the newly discovered evidence. *Id.* at pp. 826-834. Given  
18 the time that Simmers had already served, the State also indicated that it would not seek to retry  
19 him for the murder. *Id.* The Superior Court vacated Simmers' murder conviction on February  
20 26, 2019. *Id.* at pp. 835-837.

21 Simmers filed this suit thereafter. King County moved for dismissal of all claims  
22 pursuant to Rule 12(c) and the Magistrate Judge has recommended dismissal of some claims and  
23

denial of the motion with regard to others. This timely objection to the Magistrate judge's Report and Recommendation follows.

### **III. SIMMERS' REMAINING CLAIMS SHOULD BE DISMISSED PURSUANT TO COLLATERAL ESTOPPEL**

#### **A. SIMMERS' PRIOR CONVICTION FOR THE MURDER BARS ALL CLAIMS WHERE PROBABLE CAUSE IS A COMPLETE DEFENSE.**

Because Simmers was convicted of murder in state court, the magistrate judge erred by letting claims proceed where probable cause operates as a defense. Collateral estoppel should bar any claims (state or federal) Simmers makes here that rely on a lack of probable cause. See County's arguments at Dkt. 29, p. 8-9. Under Washington Supreme Court precedent, a conviction, even if overturned later, is conclusive evidence of probable cause. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993). *See also Haupt v. Dillard*, 17 F.3d 285, 289 (9th Cir. 1994) (holding that state judge's finding that probable cause existed to hold a defendant over for trial barred subsequent re-litigation as to whether probable cause existed). Probable cause is a complete defense to Simmers' claims for "State Law Malicious Prosecution", "Sixth and Fourteenth Amendment (Due Process, Fair Trial)", and "Fourth Amendment (Detention Without Probable Cause)". Dkt 1, ¶¶182-188, 137-144, 145-152.<sup>2</sup>

The magistrate judge's decision to deny collateral estoppel as to probable cause rests on mis-applying the fraud exception to the doctrine. But Simmers' allegations of fraud (alleged unlawful confession and alleged unreliability of Olsen's testimony) were fully litigated in state court and rejected by the State court judge (as discussed in sections B and C below) so the fraud exception to collateral estoppel does not apply. *Hanson*, 121 Wn. 2d 552, 561 (holding that

<sup>2</sup> Both of these claims are defended by establishing probable cause akin to the defense of state law malicious prosecution and false imprisonment claims. Simmers even titled his Fourth Amendment claim as being "Detention Without Probable Cause." Dkt.1, ¶145.

1 where Hanson's malicious prosecution claim rested on allegations that his initial conviction was  
 2 obtained by fraud, perjury or corrupt practices related to the identification procedures, the fraud  
 3 exception to collateral estoppel did not apply because the propriety of the ID procedures was  
 4 decided in the city's favor in the criminal action). As the fraud allegations were ruled on by the  
 5 state court here, the magistrate judge should have recommended granting the motions to dismiss  
 6 on collateral estoppel grounds finding that the murder conviction conclusively established  
 7 probable cause. This Court should revise the magistrate judge and dismiss these claims outright  
 8 as a matter of law.

9 **B. ALL CLAIMS BASED ON THE CONFESSION SHOULD BE BARRED**  
 10 **PURSUANT TO COLLATERAL ESTOPPEL.**

11 Noting his correct ruling that *Heck v. Humphrey* operated as a bar to Simmers'  
 12 confession claims under federal law, Judge Creatura declined to address King County's  
 13 additional argument that Simmers' confession claims were also barred by collateral estoppel.  
 14 Dkt 53, pp. 20-21. However, application of collateral estoppel is nonetheless required because it  
 15 defeats Simmers' *state law malicious prosecution* claim insofar as it relies on challenging his  
 16 confession. At a minimum, collateral estoppel must be applied to bar *any* claims (state or  
 17 federal) regarding the confession where there can be no reasonable dispute as to whether those  
 18 issues were fully litigated and decided against him in state court.<sup>3</sup> Here, as pointed out in King  
 19 County's motion (Dkt. 29 at pp. 7-12) Simmers waged an extensive challenge to his confession  
 20 in state court criminal proceeding and lost. The Court of Appeals' affirming his conviction on  
 21

22 <sup>3</sup> The elements of collateral estoppel and the full analysis of the application to the allegations are contained in the  
 23 County's motion to dismiss and reply and will thus not be repeated here. Instead, the County has limited its  
 objections to the bases that Judge Creatura rested his denials on. *Camardo v. General Motors Hourly-Rate*  
*Employees Pension Plan*, 806 F.Supp. 380, 382 (W.D.N.Y.1992) (explaining that objections are not a vehicle for a  
 party to relitigate the entirety of a motion).

1 appeal made such ruling final and binding under Washington collateral estoppel law.<sup>4</sup> The  
 2 appellate court even cited the confession as support for its ruling on one of the issues appealed  
 3 by Simmers (failure to give a particular lesser included instruction). As such he is barred from  
 4 relitigating the matter because the fraud exception cannot apply to the confession. *Hanson*, 121  
 5 Wn. 2d at 561. Because the court should apply collateral estoppel to bar any state law claims  
 6 that are derivative of the confession, the court's declining to reach that issue with regard to the  
 7 confession was erroneous.

8 **C. ALL CLAIMS BASED ON THE JAILHOUSE INFORMANT TESTIMONY**  
 9 **SHOULD BE BARRED PURSUANT TO COLLATERAL ESTOPPEL.**<sup>5</sup>

10 In denying Defendants motion on collateral estoppel grounds as to the issue of probable  
 11 cause and claims resting on allegations regarding the jailhouse informants testimony, Judge  
 12 Creatura incorrectly rested his determination on the conclusion that the "ultimate facts raised and  
 13 litigated at the 1997 CrR 7.8 hearing are not materially identical" to the allegations related to the  
 14 informant's testimony made by Simmers in this suit. While the County agrees that the way in  
 15 which these issues were raised was different in that it was in the context of whether the State had  
 16 violated *Brady*, the ultimate issues decided against him were sufficiently identical preclude the  
 17 claims here. In discussing the bounds of the post-trial motion, Simmers counsel specifically  
 18 noted that she sought to question Olsen regarding his motivation for testifying in the murder trial.  
 19 "There are additional matters that I believe that I need to examine Mr. Olsen about, but in  
 20 particular is Mr. Olsen's continued assertion that he received nothing for his testimony in this  
 21 case." Dkt 30, pp. 419; 537-539. In clarifying Simmers' basis for his Brady motion, the court

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 23 <sup>4</sup> See also King County's reply at Dkt 43, p. 5 discussing the law of the case doctrine in Washington.

<sup>5</sup> Alternatively, the court should hold that where Simmers makes no specific allegations against King County or its employees as having any involvement in procuring Olsen's testimony, the court should dismiss claims against King

inquired whether Simmers was proceeding under the allegation that the State failed to reveal all benefits to Olsen. His attorney affirmed that she was still proceeding on that basis. *Id.* at 717, 732 (§C).<sup>6</sup> Because the testimony had revealed that no one on the prosecution team (including police) had induced Olsen's testimony, the court entered findings and conclusions that there was no evidence that Olsen received any benefit or entered into any agreement for testimony in Simmer's case. *Id.* pp. 737. 537-539 (Olsen testified that he received nothing from prosecutors, King County police or Bothell police in exchange for testimony against Simmers). This conclusion was essential to the state court's holding that the State had not violated *Brady* as if the officers or the prosecutor had incentivized Olsen to testify, that would have constituted a *Brady* violation<sup>7</sup>. See *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008) (collateral estoppel bars re-litigation of "issues actually litigated" and "necessarily decided" in a prior adjudication). In this suit, Simmers expressly alleged that Olsen's testimony was "incentivized and created by the Police Officer Defendants." Dkt. 1, at 13. Because the state court already held that no such incentivizing took place (Dkt. 30, p. 737), collateral estoppel should preclude Simmers claim that the police officers induced Olsen's testimony.

**IV. SIMMERS' CLAIMS REGARDING THE CONFESSION SHOULD BE PRECLUDED BY JUDICIAL ESTOPPEL**

County based on such allegations. See Dkt. 1, ¶¶94, 97; Dkt. 29, p. 10 n.10. Although a plaintiff is properly credited with "plausible allegations" in a Rule 12 motion, dismissal is the necessary result when there are *no* allegations.

<sup>6</sup> See also the prosecutor's arguments in response to the allegations of inducement where she states in part "Mr. Olsen never received a benefit from the State or police agencies—Crime Stoppers is not a part of that—and he certainly never received anything from my office. He never received anything from Bothell." Dkt. 30, p. 711.

<sup>7</sup> While Simmers' counsel focused her arguments on payments made by Crime Stoppers as evidence of alleged *Brady* violations, that was because she had failed to elicit any testimony evidencing that the investigating officers or prosecutor incentivized Olsen to testify. Simmers should not be permitted a second bite at the apple where he could not establish that police incentivized Olsen's testimony in 1997.

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1 Judge Creatura rests his denial of applying judicial estoppel on his conclusion that “the  
 2 Court does not find that it is clear plaintiff succeeded in persuading the trial court to accept an  
 3 inconsistent position in 2019.” The magistrate judge’s conclusion as to this element of judicial  
 4 estoppel is incorrect because in order have jurisdiction to entertain such collateral attack on the  
 5 conviction and vacate under CrR 7.8(b), *the state court necessarily had to find that the*  
 6 *requirements of “newly discovered evidence” were met.* A criminal defendant seeking to vacate  
 7 a conviction more than a year after the judgment must meet the requirements of the court rule or  
 8 their motion to vacate is time barred. *State v. Cortez*, 73 Wn. App. 838, 841, 871 P.2d 660  
 9 (1994) (citing RCW 10.73.090 (1) and noting that CrR 7.8 was amended to include statutory  
 10 time limitations on filing collateral attacks on criminal judgments effective September 1, 1991).  
 11 This is why Simmers’ counsel identified newly discovered evidence as the jurisdictional basis  
 12 for the CrR 7.8 motion. Because the trial court issued the order to vacate under CrR 7.8, the  
 13 state court’s order necessarily held that the newly discovered evidence standard had been met.  
 14 Otherwise the state court would have had to deny the motion due to the applicable one-year time  
 15 bar.

16 In order to vacate, the state court’s ruling had to rest on the fact that the research on  
 17 juvenile confessions was in fact new, meaning not discoverable by the parties (which would  
 18 include investigating police), at the time of the trial.<sup>8</sup> Contrary to the magistrate judge’s  
 19 summary of the motion to vacate, Simmers did not argue that the DNA evidence was a basis to  
 20 vacate under CrR 7.8(b). Dkt. 30, pp. 753-767; Dkt. 53, p. 15, line 7-9. Instead, Simmers  
 21 acknowledged that DNA evidence did not link him to the crime at the time of the trial or at the  
 22

23 <sup>8</sup> A new trial will not be granted on the ground of “newly discovered evidence “unless the moving party  
 demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3)

time of the 2019 motion to vacate. *Id.* Simmers offered the lack of DNA evidence as support for his argument that the confession was the strongest piece of evidence against him at trial and thus the new evidence related to the confession was likely to change the outcome of the trial (as required in order to grant the motion). *Id.* The motion did not argue that the DNA results themselves met the “newly discovered evidence” standard. *Id.* As the state court’s ruling had to rest on the newly discovered evidence proffered with regard to the confession was not capable of being known to the parties at the time of trial, all of the elements of judicial estoppel are met and the court should grant dismissal of all claims that rest on the confession on these grounds.

**V. SIMMERS’ CLAIMS SHOULD BE BARRED INsofar AS THEY RELY ON  
THE WYATT ALLEGATIONS WHERE HE LACKS STANDING AND CAN CLAIM  
NO INJURY FROM WYATT’S INTERROGATION**

The magistrate judge’s ruling regarding the allegations regarding the interrogation of Jonathan Wyatt denies Defendants’ motions to dismiss on the grounds that Simmers asserts that he is not raising claims on behalf of Wyatt (where he has no standing to do so). However, the magistrate judge concludes that the claims regarding Wyatt’s confession are merely alleged by Simmers as circumstantial evidence of his own claims. While Simmers does state that the allegations serve as circumstantial evidence, Simmers’ response brief also asserts that the interrogation of Wyatt is a part of his *direct claims* against defendants. Dkt 40, p. 30-31. As discussed in the opening brief and the reply, Simmers cannot bring claims to vindicate the rights of another person as he lacks standing. He likewise cannot claim injury arising from the interrogation of Wyatt when it is undisputed that Wyatt never testified at Simmers criminal trial and no evidence gathered during Wyatt’s interrogation was used against Simmers at trial. Dkt.

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could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *State v. Williams*, 96 Wn. 2d 215, 222–23, 634 P.2d 868 (1981).

30, pp. 26-34, 364-391. The issue of whether the interrogation of Wyatt might constitute circumstantial evidence that might be admissible at trial is not the issue raised by the Defendants' motions but rather whether Simmers can assert a cause of action premised on allegations that Wyatt was unlawfully interrogated. This court should hold that Simmers may not assert a cause of action *directly premised* on allegations that Wyatt's interrogation was unlawful.

## **VI. THE STATUTE OF LIMITATIONS BARS SIMMERS' STATE CLAIMS INCLUDING MALICIOUS PROSECUTION**

The magistrate judge erred in failing to follow direct and binding Washington authority with regard to the state malicious prosecution claim.<sup>9</sup> In *Gausvik*, the Washington Court of Appeals held that state law claims of negligent investigation, outrage, negligent infliction of emotional distress, negligent supervision, malicious prosecution, false arrest, false imprisonment, and intentional interference with family relationship were barred due to the expiration of the statute of limitations and affirmed the trial court's dismissal on all state law claims holding that the statute of limitations began accruing when the plaintiff was sentenced. *Gausvik v. Abbey*, 126 Wn. App. 868, 877-881, 107 P.3d 98 (2005) (expressly rejecting the same argument that Simmers makes here: that "a cause of action does not accrue until a plaintiff can legally prove his case.") Given this direct precedent, it was error for the magistrate judge to instead follow *Flynn*, which addressed the statute of limitation for an attorney malpractice claim.<sup>10</sup> *Flynn v. Pierce Cty.*, 16 Wn. App. 2d 721, 728, 482 P.3d 980 (2021). Here, the *Gausvik* decision, which

<sup>9</sup> Judge Creatura properly held that the other state law claims were barred by the statute of limitations.

<sup>10</sup> While the County acknowledges that Washington's division two applied federal accrual reasoning this legal malpractice case where a plaintiff's claim is essentially incomplete until his conviction is reversed, such reasoning was directly rejected in a case involving malicious prosecution and other state law claims akin to the ones made here.

1 is a state appellate court decision in a malicious prosecution case, determines the statute of  
 2 limitations for that claim and is binding on a federal court. *Ryman v. Sears, Roebuck & Co.*, 505  
 3 F.3d 993, 994 (9th Cir. 2007) (“Today we reiterate the rule that when (1) a federal court is  
 4 required to apply state law, and (2) there is no relevant precedent from the state's highest court,  
 5 but (3) there is relevant precedent from the state's intermediate appellate court, the federal court  
 6 must follow the state intermediate appellate court decision unless the federal court finds  
 7 convincing evidence that the state's supreme court likely would not follow it.”).<sup>11</sup>

## 8 VII. CONCLUSION

9 For the foregoing reasons, and the reasons stated in King County’s Motion to Dismiss  
 10 (Dkt. 29) and Reply (Dkt. 43), the magistrate judge’s recommendations to deny dismissal of  
 11 other claims should be reversed.

12 DATED this 26<sup>th</sup> day of July 2021.

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 14 King County Prosecuting Attorney

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22 \_\_\_\_\_  
 23 <sup>11</sup> Assuming, *arguendo*, that Judge Creatura is correct that Division two’s Flynn decision demonstrates a sea change  
 in Washington for purposes of adopting a *Heck*-justified tolling for malicious prosecution claims, then *Heck* should  
 also bar any malicious prosecution claims that rely on Simmers’ confession.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 26, 2021, I electronically filed the foregoing document(s) with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following participants:

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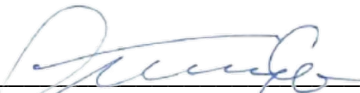
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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

1 DATED this 26<sup>th</sup> day of July 2021 at Bellevue, Washington.

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